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No. 125

IN THE

Supreme Court of the United States

October Term, 1960

SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION,

Respondents.

REPLY OF PETITIONER TO THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SEYMOUR W. MILLER
400 Madison Avenue
New York 17, New York
Attorney for Petitioner

Of Counsel:

C. PAUL BARKER
711 Carondelet Building
New Orleans, Louisiana

RAY R. MURDOCK
Sheraton Park Hotel
Washington 8, D.C.

BERNARD DUNAU
912 Dupont Circle Building, N.W.
Washington 6, D.C.

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Statement

This brief is submitted by petitioner pursuant to Rule 24(4) of this Court, in reply to the brief of the National Relations Board in opposition to the petition.

Reply

I. Timeliness of the Petition

The Board restricts its claim of untimeliness to the extent that petitioner "seeks review of the Board order remedying the Dunaine Wharf picketing * * *" (Brief

in Opposition, p. 9). No dispute exists as to the timeliness of the petition with respect to the order dealing with the Gretna Wharf picketing. The basis for the Board's claim is the extract from the Court's minutes of January 21, 1960 (Brief in Opposition, p. 14).

The Board's position is invalid, for the following reasons:

a. Rule 38 of the Rules of the United States Court of Appeals for the Fifth Circuit, entitled "Respecting Review of Orders of the National Labor Relations Board", states, in section (5) thereof:

> "(5) PREPARATION OF DECREES ENFORCING ORDERS-SETTLEMENT-ENTRY
>
> When an opinion of this Court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the Court has not entered the decree, the agency, board, commission, or officer concerned shall within ten days serve upon the respondent and file with the Clerk a proposed decree in conformity with the opinion. If the respondent objects to the proposed decree as not in conformity with the opinion, he shall within five days thereafter serve upon the agency, board, commission, or officer concerned and file with the Clerk a proposed decree which he deems to be in conformity with the opinion. The Court will thereupon settle and enter the decree without further hearing or argument."

Manifestly, because the Board—and, we submit, the Fifth Circuit, as well—did not consider the extract a final disposition, the Board submitted a proposed decree and, on March 9, 1960, the Court's decree was entered (Pet., p. 12a-13a).

b. That decree, it will be noted, makes no express reference to any former judgment. The context of the use therein of the word, "decision", suggests, rather, a reference to the opinion of January 21, 1960, "in conformity with" which the March 9 decree was entered. While mindful of the general rule that nomenclature does not necessarily determine what the Court's end process may be (for the purpose of evaluating the timeliness of a petition to review it), we nonetheless submit that the title of the March 9 document is of significance here, conforming as it does not only to the nomenclature employed in the Fifth Circuit's Rule, but also to the nomenclature of the final disposition referred to in Secs. 10(f) and (h) [Title 29, U. S. C., Secs. 160(f) and (h)] of the National Labor relations Act, as amended.

c. In addition, we may inform the Court that Mr. C. Paul Barker, of New Orleans, trial counsel in this case and "of counsel" in this phase of the proceedings, was informed by Mr. Edward W. Wadsworth, Clerk of the U. S. Court of Appeals, Fifth Circuit, that he considered the date of entry of the decree—not the date of the extract from the minutes—as the date of final disposition, so that it is from that date that the time for filing the petition starts running (cf., Stern and Gressman, Supreme Court Practice (2nd Edition), BNA Incorporated, p. 162).[1]

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[1] A considerable argument could be made, in our judgment, for measuring the time to file a petition from the May 23, 1960 Supplemental Decree (Pet., p. 19a-20a). However, we do not make this argument, since the primary purpose of this phase of the reply is to demonstrate that the January 21, 1960 extract does not render the petition untimely as to the Dumaine Wharf segment of the case.

d. Finally, since the legal question arising from the opinion and decree below is the same with respect to the Dumaine and Gretna picketing, (see Brief in Opposition, p. 11), if certiorari be restricted to the latter portion of the case, ultimate victory by the Union in this Court would result in an anomalous situation. Picketing could then be resumed at the Gretna Wharf, but would be beclouded by an existing injunction at Dumaine, conjecturally not, perhaps, a totally irremediable situation, but one which this Court could so easily obviate, notwithstanding the assumption, arguendo, of the validity of the Board's claim of untimeliness (cf. *United States* v. *Ohio Power Company* (1957) 353 U. S. 98, 1 L. Ed. (2d) 683, 77 Sup. Ct. 652: rehearing denied 353 U. S. 977, 1 L. Ed. (2d) 1139, 77 Sup. Ct. 1053.

II. Importance of the Case and the Conflict Among the Circuits

The Board opposes the petition by way of a usual route, asserting, as it does, that the case involves no more than the resolution of factual questions (see Brief in Opposition, p. 9). The choice of route is not surprising. What is surprising is the Board's opposition in the face of an opinion in self-proclaimed disagreement with the "rationale" of other Circuits, expressly naming the District of Columbia Circuit (Pet. p. 9a) and expressly differing with the leading Board case on common situs picketing, *Moore Dry Dock Co.* (1950) 92 NLRB 547 (Pet., p. 10a), in reliance upon which the picketing in this case was conducted. Most important of all, however, the accommodation of the rights of primary picketers with the rights of neutral employers, laboriously developed by the Board and approved by at

least six Circuits as "a sound interpretation of the Act" (Pet., p. 17), becomes non-existent, if the opinion and decree below are to be upheld. For if, as the Court below would have it, it is the burden of primary picketers at a common situs to so conduct their picketing as to overcome "the normal appeal of a picket line" (Pet., p. 10a), it is clear that that Court, as we stated in the petition, is calling for the total insulation of neutral employers. But, total insulation of a neutral employer is the very antithesis of this accommodation. The two cannot be reconciled, for the very term, "accommodation", inexorably implies the "normal appeal of a picket line" specifically recognized by the Court below (Pet., p. 10a).

It is with respect to this point that the invalidity of the Board's opposition, in classifying the decree below as simply constituting a factual resolution unfavorable to petitioner, is most clearly demonstrated. More significantly, it is with respect to this point that the conflict between the Court below and the other Courts of Appeals cited in the petition becomes so clearly delineated. And, finally, it is this point which demonstrates the overriding importance of the holding below. It is of overriding importance to all of labor but, to maritime labor unions such as petitioner (and other unions similarly situated, such as, for example, those in the building trades), whose picketing activities perforce take place overwhelmingly predominantly at a common situs, it is no exaggeration to say that what is at stake here is the ability of such unions to picket at all.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SEYMOUR W. MILLER,
Attorney for Petitioner
400 Madison Avenue
New York 17, New York

Of Counsel:

C. PAUL BARKER, Esq.
711 Carondelet Building
New Orleans, La.

RAY R. MURDOCK, Esq.
Sheraton Park Hotel
Washington 8, D. C.

BERNARD DUNAU, Esq.
912 DuPont Circle Building, N.W.
Washington 6, D. C.

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